DSD DILLINGER STAHLBAU GMBH

v.

ANNIE CHONG & ANOR.

HIGH COURT, BRUNEI
DENYS ROBERTS CJ
[CIVIL SUIT NO. 195 OF 1985 & NO. 413 OF 1986 (CONSOLIDATED)]
20 & 22 FEBRUARY 1988

CIVIL PROCEDURE: *Jurisdiction - Claim under foreign revenue statute - Contract performed in foreign jurisdiction - Claim by foreign company against citizen - Whether local Court had jurisdiction.*

The parties entered into an oral agreement in Malaysia whereby the defendants, a partnership agreed to supply labour to the plaintiffs, a company incorporated in Germany and registered as a foreign company in Malaysia at their methanol and power plants in Malaysia. The first defendant was a Brunei citizen. The plaintiffs claimed for a sum of money which they had paid to the Inland Revenue Department of Malaysia as tax under s. 107A, Malaysian Income Tax Act. The provision provided that 20% of all payments made to a non-resident had to be paid by the plaintiff as a withholding tax to the Inland Revenue Department of Malaysia. The said oral agreement did not provide for the payment of the said tax. There was a counter-claim for sums due under the oral agreement.

Held:

[1] Although the plaintiffs were entitled to recover the tax which they had paid by virtue of s. 107A(3)(C), Malaysia Income Tax Act, they could not institute an action in Brunei to recover a debt under a foreign revenue statute.

[2] The defendant had proved that the plaintiff owed the sum claim in the counter-claim under the oral agreement.

[Plaintiff's claim dismissed with costs. Defendants' counter-claim allowed. No order as to costs.]

Cases referred to:
Aiken v. Short [1856] 1 H & N 210
Holeman v. Johnson [1775] 1 Comp 341
Government of India v. Taylor [1955] AC 491

Legislation referred to:
Income Tax Act 1967, ss. 107A, (3)(c)

For the plaintiffs - Dy. Norila Abu Hassan (Valentine Willie with her); M/s. D.F. Abang Zen
For the defendants - in person

JUDGMENT

Denys Roberts CJ:

Preliminary

In these two civil suits, which were consolidated by the Chief Registrar on 13 February the plaintiffs, a company incorporated in the Federal Republic of Germany and registered in Malaysia as a foreign company carrying on business in the territory of Labuan, Malaysia, claim the sum of RM880,600.60, or its equivalent in Brunei currency, and other ancillary relief.

Awang Rambli appeared in person at the trial, both on his own behalf and on that of the 1st defendant, Mrs. Annie Chong.

He assured me, and I have no reason to disbelieve him, that the 1st defendant is no more than a sleeping partner, who knew little of the business and had become a partner of his on 10 March 1984, because the Malaysians had insisted that he should have a partner who was a Malaysian, as she was because she had been born in Malaysia. He himself was born in Brunei and a Brunei citizen, though he was in Labuan for much of the time during the currency of the contract with the plaintiffs.

Although the defendants traded as the Sinar (S) Company, the latter was not incorporated at any time and remained a partnership, the 2nd defendant, the husband of the 1st defendant, remaining as the active partner who undertook all the work.

Background

It has been established to my satisfaction that at the material times in 1983 and 1984, the plaintiffs were carrying out work in Labuan at the methanol and power plants.

The defendants agreed, by an agreement which both parties said in evidence was entirely oral, to supply labour, at rates agreed with the plaintiffs, for use by the latter at the methanol and power plants.

During the progress of the agreement, the plaintiffs made payments to the defendants (which in practice meant the 2nd defendant) of RM4,403,003.02, according to their statement of claim.

About the middle of 1984, the Inland Revenue Department of Malaysia sought to recover from the plaintiffs 20% of the sums which the plaintiffs had paid to the defendants for the supply of labour.

This sum, amounting to RM880,600.60, was paid by the plaintiffs to the Inland Revenue Department of Malaysia from June 1985 onwards.

The plaintiffs assert that, under s. 107A of the Malaysian Income Tax Act, they are obliged to pay to the Inland Revenue Department 20% of all payments made to any non-resident and that it was only when the latter certified the defendants as non-resident that the plaintiffs were obliged to pay.

Was 20% deducted?

I must first try to find, though presented with inadequate evidence, whether or not 20%, or any other sum, was deducted by either party at the time of payment, or at any time thereafter, except to the Department itself. As to the later, I am satisfied that 20% or RM880,600.60, was paid by the plaintiffs to the Department in June 1985 and September 1985.

Mr. Lux, who alone gave evidence for the plaintiffs, was sure that there had been no mention of residence during his negotiations with the 2nd defendant. He assumed, he said, that the contract would be carried out according to law but did not make enquiries himself about status or about holding back any part of the contract sum.

Mr. Lux, though the site engineer for the plaintiffs, had been in charge of all contracts for the supply of labour, including that with the defendants.

Mr. Lux was sure that he did not discover that there was tax to pay before he received a demand in 1984, and that he never discussed this with Awang Rambli.

The 2nd defendant has a different story, though it must be noted that it is not one which he has previously raised, in his pleadings or elsewhere.

In his earlier defence, to CS 195/85, dated 14 July 1986, the 2nd defendant put forward a number of assertions, in relation to the amount of RM880,600.60, but none of these included any allegation that the 20% had been paid by the 2nd defendant to the plaintiffs at any time.

In his original affidavit of 11 December 1985, the solicitor for the 2nd defendant, acting on the instructions of the latter, put forward objections to the recovery of the amount claimed by the plaintiffs. He did not assert that the 2nd defendant had already paid the amount to the plaintiffs.

In November 1987, the 2nd defendant filed a wholly new defence, striking out the 1986 version and inserting an entirely fresh one. This contained para. 18, in which it is said that the plaintiffs had already deducted 20% of each amounted in order to pay taxes due.

By para. 19 it is said that the sum of RM880,660.60 was deposited with the plaintiffs as it was collected by the plaintiffs' agent whenever payment was made to the plaintiffs.

This was the first time that the 2nd defendant alleged that he was not liable to pay 20% of the first sum which he received from the plaintiffs, because this sum had already been deducted by the plaintiffs.

He asserted in evidence that 20% of all payments to him by the plaintiffs were taken by Mr. Muhlberger or Mr. Reiler, the administrative manager. These amounts were taken in cash and no receipts were given at all.

Awang Rambli was shown a number of instances in which large sums payable for labour had been paid to him by cheque, which he had cashed for the same amount. There was no deduction of 20% for tax or any other reason.

The 2nd defendant agreed that the full amounts were paid to him in each case, but that he thereafter gave cash, amounting to 20% to Mr. Muhlberger or Mr. Reiler.

He was unable to call Mr. Muhlberger to give evidence, since he could not trace him. Nor were the plaintiffs able to find him, as he has left the service of the company.

In his absence, and that of Mr. Reiler, I must decide on the sparse evidence which I have of those transactions. I am satisfied that the plaintiffs have established, on a balance of probabilities, that there was no mention of tax in the oral agreement which they entered with the defendants for the supply of labour in 1983 in Labuan.

Mr. Lux, who negotiated the contract with the 2nd defendant, did not mention Malaysian tax. And I am sure that the defendant is in error in his recollection when he says that there was in each case a handing back by him of 20% of what was paid to him. As Mr. Lux said, he did not know of this.

If there had been such a return of cash by him, Mr. Lux would have known about it, a receipt would have been given and the 2nd defendant would have mentioned it as his defence from the outset.

I am satisfied that there was no mention of the status of the defendants when the contract was concluded orally between Mr. Lux and Awang Rambli because it was then assumed by all parties that the defendants were local residents under Malaysian tax law.

Therefore, the amount of RM880,660.60, which the plaintiffs paid, was due from them to the Malaysian Inland Revenue Department as a withholding tax, under s. 107A of the Malaysian Income Tax Act if, of course, that Department was correct in its assessment of the defendants as non-resident.

Was this a revenue payment?

I do not accept the argument of the plaintiffs that this amount was paid by the plaintiffs in such circumstances that was reclaimable by them as money paid under a mistake of fact, in accordance with the principles of *Aiken v. Short* [1856] 1 H & N 210, 215.

I have no doubt that the payment of RM880,600.60 which the plaintiffs made to the Inland Revenue Department of the Malaysian Government was a payment due under the Malaysian Income Tax Act, which is without doubt, and this is agreed by both parties, a revenue measure, designed solely to govern the raising of finance for the Malaysian government.

The payment by the plaintiffs was therefore made by them for the purposes of revenue law and for that reason only. It was made by them as the outcome of a determination of the status of the defendants, although they were themselves not able to dispute this finding before the plaintiffs were obliged to pay.

Under s. 107A(3)(c) of the Act, the payer, that is to say the plaintiffs in this instance, are entitled to attempt, if they have paid a withholding tax under that section, to recover it. This they have tried to do in Brunei Darussalam. Even though the statement of claim does not in terms provide that this is the essence of the claim, it is clear from a general reading of it that the plaintiffs have sought to enforce here a debt contracted under the tax law of Malaysia.

It was first established as early as 1775 that "no country every takes notice of the revenue law of another" see Lord Mansfield in *Holeman v. Johnson* [1775] 1 Comp 341.

This means that the Brunei Courts, in which the common law applies, will not enforce a foreign revenue law see *Government of India v. Taylor*, [1955] AC 491, on the general principle that tax gathering is a matter of administration between the state and those within its jurisdiction.

This is an attempt by the plaintiffs to achieve enforcement of the Malaysian tax law, which confers on the payer of a withholding tax remedies to be pursued in Malaysia.

I should perhaps make it clear that I do not criticize the plaintiffs for attempting to recover from the defendants in Brunei Darussalam a substantial sum of money which, according to my finding, was paid by the plaintiffs because the Malaysian Inland Revenue Department decided that the defendants were non-residents of Malaysia for tax purposes.

I must, nevertheless. conclude that the plaintiffs fail in their claim and that this must be dismissed, because they are attempting to enforce in Brunei Darussalam the revenue laws of another country.

It may be that, if they pursue the defendants in Labuan under the Malaysian Act, they would be more fortunate.

Counterclaim

As I have indicated above, the plaintiffs' claim fails, not on its merits but under the rule that a foreign revenue law shall not be enforced in another country.

However, I reject the suggestion made in para. 14(a) of the defence of 12 November, that the plaintiffs had no *locus standi*. I have no doubt that they were a registered limited company, that they were operating in Malaysia, with authority to do so, though this is not relevant, and that they were entitled to sue the defendants for the recovery in Malaysia of tax paid on the defendants' behalf.

It is not for me to give the declaration sought in para. 14(b). This is a matter for the Malaysian Inland Revenue Department or, if the latter's ruling is challenged, for the Malaysian Court, It is not for me to decide this matter.

I do not find that the 2nd defendant has shown that the plaintiffs wrongfully collected any sum from him. Indeed, I have concluded that no such sum was given by the 2nd defendant to the plaintiffs at any time (para. 14(c)).

It follows from my conclusion on para. 14(b) and para. 14(c) that I will not order that the plaintiffs should refund to the defendants the sum claimed under para. 14(d) of the defence of 12 November.

Although I am satisfied that the 2nd defendant has established that his counterclaim should succeed, to the extent of RM10,158.25, as he claims in para. 14(c) of the counterclaim, I must remark that no details of this amount appear in the pleadings and that, if he were not a litigant in person, I should have disallowed the item unless it were particularized.

The 2nd defendant has produced a voucher, addressed by the Manager of Sinar (S) Company to the Malaysian Income Tax Department, dated 27 October 1984. This shows that a sum of RM10,158.25 has not yet been paid to the Sinar (S) Company for the period 1 March to 30 September 1984.

This is the sum which the 2nd defendant claims by way of counterclaim and it appears, by virtue of Mr. Frez's letter on behalf of the plaintiffs, that this is not challenged.

Indeed, Mr. Lux, giving evidence for the plaintiffs, testified that he thought that, as a result of a dispute with Sinar (S) which arose about tax at a late stage, the plaintiffs still owed "about RM20,000 or so" to Sinar (S), though there seemed to have been some over-payment.

On balance, I am sure that the 2nd defendant has proved that the plaintiffs owe to him the sum of RM10,158.25. This was due to him under the oral contract, was in one of the invoices submitted by him, was due to him and was not paid by the plaintiffs. As there was no agreement between the parties as to deduction of 20% of the sums paid by the plaintiffs to the defendants, the latter were entitled to the full amount, on all payments, including the RM10,158.25.

There should, therefore, be judgment for the defendants on the counterclaim only for RM10,158.25, plus interest at 6% from 30 September 1984, when the money was due, until the date of judgment herein.

Costs

I have decided that the plaintiffs were not entitled to succeed on their main claim, not because there may be no merits in their favour, as to which I did not reach any finding, but because it is not open to any country to enforce the revenue laws of another.

It must follow that the defendants are entitled to their costs on the claim, even though these are unlikely to be large, since they were not legally represented except at earlier stages of the proceedings against them.

Security for the costs of the defendants has already been lodged, in the sum of BD50,000, by means of a bank guarantee, which has been given on behalf of the plaintiffs.

The costs of the defendants on the claim should be taxed and the balance paid to the plaintiffs.

So far as the counterclaim is concerned, the costs of this are very small as a separate issue, since these are largely absorbed in the costs of the main action by the plaintiffs. I therefore make no order as to the costs of the counter-claim.

Also found at [1988] 1 CLJ 708